

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC5

WCC No. 2010-2627

ELIZABETH & GAYLE FLORENCE

Petitioners

vs.

VICTOR MORALES

and

UNINSURED EMPLOYERS' FUND

Respondents.

**ORDER GRANTING RESPONDENT UNINSURED EMPLOYERS' FUND'S
MOTION TO DISMISS**

Summary: Respondent Uninsured Employers' Fund moved for dismissal of Petitioners' Petition for Hearing on the grounds that the petition was time-barred and therefore beyond the jurisdiction of this Court. Respondent Victor Morales joined in the UEF's motion. Petitioners responded that they do not believe Morales suffered a work-related injury and that they missed the deadlines due to their own medical issues.

Held: Petitioners' Petition for Hearing is dismissed since they failed to request mediation of the UEF's determination within 90 days pursuant to § 39-71-520(1), MCA.

¶ 1 Respondent Uninsured Employers' Fund (UEF) moves this Court to dismiss the Petition for Hearing filed by Petitioners Elizabeth & Gayle Florence in this matter. The UEF argues that the Florences' petition is not timely filed, and that the Florences did not timely appeal the UEF's determination accepting liability for Respondent Victor Morales' claim for benefits.¹ Morales joins in the UEF's motion to dismiss.² The Florences object to the UEF's motion, arguing that Morales was not injured in the course and scope of

¹ Uninsured Employers' Fund's Motion to Dismiss and Brief in Support Thereof (Opening Brief), Docket Item No. 6.

² Respondent Morales' Motion to Dismiss, Docket Item No. 8.

his employment, that the Florences cannot afford to hire an attorney to represent their interests in this matter, and that they missed the pertinent deadlines because of personal medical issues.³ The UEF replies that the Florences have presented no evidence which would equitably toll the applicable statutes of limitation, and their petition should therefore be dismissed with prejudice.⁴

Factual Background⁵

¶ 2 On February 12, 2010, Morales signed a First Report of Injury claiming that he suffered an injury to his low back that day while working with the Florences, d/b/a the Automaster.

¶ 3 On February 19, 2010, the UEF wrote to the Florences and informed them that the UEF had not located workers' compensation coverage for them. The UEF informed the Florences that, as a non-covered employer, they were subject to potentially unlimited liability for an injured employee that had an action for damages due to an on-the-job injury.

¶ 4 On March 22, 2010, the UEF accepted Morales' claim for benefits under a full reservation of rights after it reviewed his medical information and the Department's file. The UEF mailed the March 22, 2010, determination to Morales and the Florences and informed them that under § 39-71-520, MCA, the determination would be considered final if no one appealed it within 90 days.

¶ 5 On August 10, 2010, the Florences filed a petition for mediation.

¶ 6 On August 20, 2010, the workers' compensation mediation unit issued an Order of Dismissal, indicating that the Florences' appeal was filed more than 90 days after the UEF determination.

¶ 7 On December 2, 2010, the Florences filed a Petition for Hearing in the Workers' Compensation Court, contending that Morales did not suffer an industrial injury and that they should be released from any liability.

³ [Petitioners' Response to Uninsured Employers' Fund's Motion to Dismiss] (Response Brief), Docket Item No. 13.

⁴ Uninsured Employers' Fund's Reply Brief in Support of UEF's Motion to Dismiss (Reply Brief), Docket Item No. 11.

⁵ As set forth in the UEF's Opening Brief at 2. Although the Florences dispute Morales' account of his injury, they do not contest the procedural history as set forth by the UEF.

Discussion

¶ 8 The UEF argues that the Florences have missed two deadlines in pursuing their claim: (1) they did not appeal the UEF's March 22, 2010, determination until August 10, 2010, which is untimely under § 39-71-520(1), MCA; and (2) they did not file a petition in this Court following the mediator's August 20, 2010, Order of Dismissal until December 2, 2010, which is untimely under § 39-71-520(2), MCA.⁶

¶ 9 The Florences do not dispute that their appeal of the UEF's determination and their filing of a petition in this Court were untimely. The Florences express their regret at missing the deadlines, but contend that Morales was not injured in the manner he alleged in his First Report of Injury, and further contend that the Florences' financial and health problems have precluded them from hiring an attorney or diligently pursuing their rights in this claim.⁷

¶ 10 Section 39-71-520, MCA, states, in pertinent part:

(1) A dispute concerning uninsured employers' fund benefits must be appealed to mediation within 90 days from the date of the determination by the department or the determination is considered final.

(2) (a) If the parties fail to reach a settlement through the mediation process, any party who disagrees with the department's determination may file a petition before the workers' compensation court.

(b) A party's petition must be filed within 60 days of the mailing of the mediator's report provided for in 39-71-2411 unless the parties stipulate in writing to a longer time period for filing the petition.

(c) If a settlement is not reached through mediation and a petition is not filed within 60 days of the mailing of the mediator's report, the determination by the department is final.

¶ 11 Under § 39-71-520(1), MCA, the department's determination of compensability is final unless it is appealed to mediation within 90 days. Once the determination is deemed final, an uninsured employer is barred from contesting liability for the industrial

⁶ Opening Brief at 2-3.

⁷ Response Brief.

injury.⁸ In *Wilson v. Uninsured Employers' Fund*, the UEF made a determination of compensability and immediately informed the uninsured employer of its determination, advising the uninsured employer that the decision would become final if not appealed to mediation. When the uninsured employer did not appeal within 90 days, the determination became final. I held that the uninsured employer's later attempt to dispute the UEF's determination that it was an uninsured employer and that its employee had a compensable claim was untimely under § 39-71-520(1), MCA.⁹

¶ 12 The 90-day time period to request mediation under § 39-71-520(1), MCA, begins to run on the date of the UEF's determination.¹⁰ Failure to request mediation of a UEF determination within 90 days prevents a party from seeking review of that determination by the Workers' Compensation Court.¹¹ If a party does not request mediation within 90 days of the UEF's determination, the request is time-barred and the UEF's determination become unappealable; neither the Mediation Unit nor the Workers' Compensation Court may hear the matter.¹² In the present case, it is undisputed that the Florences did not request mediation until more than 90 days after the UEF issued its determination. Therefore, the UEF's determination became final and unappealable.

¶ 13 Recently, the Montana Supreme Court held that this Court has the jurisdiction to apply the doctrine of equitable tolling to procedural time bars.¹³ The court noted that this doctrine must be applied only sparingly and not in cases of "what is at best a garden variety claim of excusable neglect."¹⁴ The court cited examples of when the doctrine is correctly applied, including a case of first impression regarding the effect of new legislation when the plaintiff had reasonably relied on the court's previous holding, and a case in which a claimant initially filed her complaint in the wrong court when she was faced with a "procedural quandary" as to whether a tribal court had jurisdiction.¹⁵ In *Weidow v. Uninsured Employers' Fund*, the Montana Supreme Court found that the procedural time bar of § 39-71-520(2), MCA, should be equitably tolled because the claimant diligently pursued his claim and petitioned this Court nine days after the filing period had expired due to misunderstanding the statute. The court noted that no

⁸ *Uninsured Employers' Fund v. Grant*, 2004 MTWCC 38, ¶ 31.

⁹ *Wilson v. Uninsured Employers' Fund*, 2010 MTWCC 5, ¶¶ 35-36.

¹⁰ *Flynn v. Uninsured Employers' Fund*, 2005 MT 269, ¶ 17, 329 Mont. 122, 122 P.3d 1216.

¹¹ *Flynn*, ¶ 13. (Citing §§ 39-71-2408, -2905, MCA (2001).)

¹² *Flynn*, ¶ 18.

¹³ *Weidow v. Uninsured Employers' Fund*, 2010 MT 292, ¶ 23, 2010 WL 5476737.

¹⁴ *Weidow*, ¶ 28. (Citation omitted.)

¹⁵ *Weidow*, ¶¶ 25-26. (Citations omitted.)

evidence suggested that the delay caused prejudice to the uninsured employer nor did the delay inhibit the ability to collect evidence.¹⁶

¶ 14 In the present case, the UEF argues that no equitable basis exists for the Court to toll the time limitations of § 39-71-520, MCA. The UEF argues that the Florences' only basis for their untimeliness is their assertion that they both experienced significant health problems in 2010. The UEF contends that the Florences have presented no evidence to suggest that any of their medical conditions rendered them incapable of asserting their rights, but only that their conditions made it more difficult for them to do so.¹⁷ In *Weidow* and the cases the Montana Supreme Court relied upon in concluding that the time bar should be equitably tolled, the affected parties all diligently pursued their claims and missed the time limitations due to a lack of clarity regarding the procedural requirements of their respective cases. In the present case, the Florences did not diligently pursue their claim, and their untimeliness was not due to any misunderstanding of their procedural obligations. Therefore I conclude the statutory time bar cannot properly be equitably tolled in their favor.

¶ 15 Since I have determined that the Florences' request for mediation was untimely under § 39-71-520(1), MCA, and that their claim is time-barred under that statute, I do not reach the issue of whether their petition to this Court was untimely under § 39-71-520(2), MCA.

ORDER

¶ 16 The Uninsured Employers' Fund's motion for dismissal with prejudice is **GRANTED**.

¶ 17 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 24th day of February, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Elizabeth & Gayle Florence
Thomas J. Murphy
Leanora O. Coles
Submitted: February 17, 2011

¹⁶ *Weidow*, ¶ 29.

¹⁷ Reply Brief at 2.